INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes and rule involved	2
Question presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:	
Anderson v. *Dunn*, 6 Wheat. 204	5
Barenblatt v. *United States*, 360 U.S. 109	10
Flast v. *Cohen*, 392 U.S. 83	7
Flemming v. *Nestor*, 363 U.S. 603	6
Gojack v. *United States*, 384 U.S. 702	10
Stamler & Hall v. *Willis*, pending on jurisdictional statement, Nos. 478, 479, this Term	5, 6
Watkins v. *United States*, 354 U.S. 178	7, 10
Constitution, statutes and rules involved:	
Constitution of the United States, Art. I, Sec. 5	8
Legislative Reorganization Act of 1946, 60 Stat. 812 *et seq.*	7, 8, 9
28 U.S.C. 2282	2, 5, 6, 7, 9
2284	2, 5
Fed. R. Civ. P. 12(h)	6
H. Res. 8, 89th Cong., 1st Session, 111 Cong. Rec. 21	2
Rule XI of the House of Representatives	5
Rule XIV of the Committee's Rules of Procedure (Revised 1965)	3
Miscellaneous:	
Investigative Hearings before the Committee on Un-American Activities, House of Representatives, Eighty-Ninth Congress, Second Session, August 16-19, 1966, entitled "Hearings on H.R. 12047, H.R. 14925, H.R. 16175, H.R. 17140, and H.R. 17194—Bill to Make Punishable Assistance to Enemies of U.S. in Time of Undeclared War"	3, 4, 5

325-451—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 633

DR. ALLEN M. KREBS AND WALTER D. TEAGUE, III,
PETITIONERS

v.

JOHN M. ASHBROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals and separate concurring opinion (Pet. 1a–4a) are not yet reported. The opinion of the district court is reported at 275 F. Supp 111 (Pet. 5a–23a). The district court's original request for the convening of a three-judge district court is annexed to the petition (Pet. 24a–25a).

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1968. Petitioners' timely petition for rehearing was denied July 12, 1968. The petition for certiorari was filed on October 10, 1968. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

The authority under which the House Committee on Un-American Activities operated at the time the complaint in this action was filed was H. Res. 8, 89th Cong., 1st Sess., 111 Cong. Rec. 21, providing in pertinent part:

> *Resolved,* That the Rules of the House of Representatives of the Eighty-eighth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, as amended, be, and they are hereby adopted as the Rules of the House of Representatives of the Eighty-ninth Congress * * *.

The pertinent provisions of the Legislative Reorganization Act thereby incorporated and other pertinent federal statutes are set out in the petition at pp. 5-8.

QUESTION PRESENTED

Whether a Rule of the House of Representatives is an "Act of Congress" within the meaning of 28 U.S.C. 2282, so that an action seeking to enjoin the operation of a Committee of the House of Representatives under that Rule is one "required * * * to be heard and determined by a district court of three judges" (28 U.S.C. 2284).

STATEMENT

On July 14, 1966, the House Committee on Un-American Activities (the Committee) resolved to hold hearings in Washington, D.C., to investigate certain

conduct deemed to support, in various ways, the North Vietnamese side of the Vietnam conflict.[1] In accordance with Rule XIV of the Committee's Rules of Procedure (Revised 1965), Chairman Edwin E. Willis appointed a subcommittee of five members with Honorable Joe R. Pool as chairman to conduct the hearings. (Hearings, *infra*, 920.) Petitioners were subpoenaed to appear before the subcommittee in Washington on August 16, 1966.

[1] BE IT RESOLVED, That hearings by the Committee on Un-American Activities, or a subcommittee thereof to be designated by the Chairman, be held in Washington, D.C., or at such other place or places and on such date or dates as the Chairman may determine, relating to (a) the extent, character, and objectives of organizations and groups within the United States which solicit money, supplies, and material assistance for delivery to, or in aid of, Communist powers or forces engaged in armed conflict with the United States; (b) the extent, character, and objectives of organizations and groups within the United States which advocate or employ force, physical impediments, or any unlawful means to obstruct the movement of personnel and supplies of the armed forces of the United States; (c) the extent, character, and objectives of organizations and groups within the United States which engage in activities designed to impair or interfere with the loyalty, morale, or discipline of the armed forces of the United States and the recruitment of personnel for such forces; (d) Communist propaganda activities in the United States conducted in support of the Communist regime in North Vietnam, or for the purpose of advancing the policies and objectives of the world Communist movement generally; (e) the activities of United States citizens acting on behalf of, or in the interest of, foreign Communist principals, and foreign travel undertaken by United States citizens in connection with such activities; and (f) all other questions in relation thereto, for the following legislative purposes:

(1) To provide factual information to aid the Congress in the disposition of presently pending legislation, including but

The day before the return date of the subpoenas, the petitioners began this action, seeking a temporary restraining order against conduct of the hearings, the convening of a three-judge district court, injunctive protection against anticipated contempt proceedings, and a prohibition against further operations by the Committee under the authority of Section 18 of

---

not limited to H.R. 12047, H.R. 14925, and H.R. 16175, bills to amend the Internal Security Act of 1950, which would make punishable the giving of certain assistance to foreign powers engaging in armed hostilities with the United States and the obstructing of the free movement of personnel and supplies of the armed forces of the United States.

(2) Consideration of the advisability of amending the Internal Security Act of 1950, with particular reference to section 6 of such Act to regulate travel abroad by citizens of the United States, the registration of Communist organizations, and making punishable the obtaining of money or property by fraud to benefit a foreign government or alien.

(3) Consideration of the advisability of amending the Subversive Activities Control Act of 1950 so as to impose certain disabilities in the manner and form therein provided upon those persons who are "affiliated with" Communist organizations, as well as upon persons who are members thereof.

(4) To provide factual information to aid the Congress in the proposal of any necessary remedial legislation in fulfillment of the authority and directions contained in the mandate to the committee by House Resolution 8 of January 4, 1965, and Public Law 601 of the 79th Congress.

Investigative Hearings before the Committee on Un-American Activities, House of Representatives, Eighty-Ninth Congress, Second Session, August 16–19, 1966, entitled "Hearings on H.R. 12047, H.R. 14925, H.R. 16175, H.R. 17140, and H.R. 17194—Bills to Make Punishable Assistance to Enemies of U.S. in Time of Undeclared War", Part 1, pp. 916–917 (hereinafter, "Hearings").

Rule XI of the House of Representatives (the Committee's authorizing resolution). The complaint, very similar to that in *Stamler and Hall* v. *Willis,* pending on jurisdictional statement, Nos. 478, 479, this Term, alleged that the pending Committee hearings and the Rule constituting the Committee's charter were unconstitutional.

A three-judge court was convened and immediately dissolved a temporary restraining order that had been granted by a single judge. Petitioners appeared at the hearings but failed to respond when called to testify (Hearings 1070–1071, 1160).

The Committee did not report the petitioners for a possible contempt of Congress citation, with the result that the validity of the subpoenas and the propriety of the 1966 hearings are not now issues in the case. The only significant issue remaining on the merits is whether—assuming the Committee would continue to operate in future Congresses under a charter like Rule XI—it should be restrained from doing so.

The three-judge court did not reach this issue, but rather dissolved itself as improperly constituted; it held that the Rule under attack was not an "Act of Congress" within the meaning of 28 U.S.C. 2282 and thus that the case was not susceptible of determination by a three-judge court under 28 U.S.C. 2284. The court of appeals affirmed this action and the case remains pending before a single judge of the district court.

ARGUMENT

The only matter before this Court is the holding of the district court and the court of appeals that a three-judge court is not required because petitioners' challenge is not to an "Act of Congress" within the meaning of 28 U.S.C. 2282. For the reasons set forth in our Motion to Dismiss or Affirm in *Stamler and Hall* v. *Willis* (Nos. 478 and 479, this Term) at pp. 8–12, we believe that this holding that the case is one for a single judge was correct.[2] Moreover, the posture of this case makes the question one of limited practical significance here. The courts below did not deny petitioners a federal remedy, but merely remitted them to the normal procedures for consideration of their substantive contentions in the district court. Further review at this stage would only delay consideration of those substantive contentions on their merits.

Without repeating our argument in *Stamler and Hall,* we have the following further observations with respect to petitioners' contentions here.

1. Apparently conceding (Pet. 23–25) that the decision of the court below was correct as to the status of a rule of Congress under the three-judge statute, petitioners rest their case upon the proposition that the Committee has an "alternative source of authority"

[2] Petitioners appear to argue that the "Act of Congress" question had been waived. The question is, however, jurisdictional and could properly be raised at any stage of the proceedings, by the parties or by the court on its own motion. Fed. R. Civ. P. 12(h); cf. *Flemming* v. *Nestor*, 363 U.S. 603, 607, where "[n]either party requested a three-judge court below," and this Court seems to have raised the issue on its own motion.

in the Legislative Reorganization Act of 1946, 60 Stat. 812. Saying that the provisions of the Reorganization Act relating to the Committee do fall within the definition of 28 U.S.C. 2282, they go on to assert that three-judge jurisdiction over the whole case exists by analogy to the principles of *Flast* v. *Cohen,* 392 U.S. 83, 90–91, because they attack both the Rule and the Act.

This approach fails because the three-judge court properly held that the Committee draws its authority only from the House Rules adopted for each Congress and not at all from the Reorganization Act. In fact, the Reorganization Act provisions relating to the Committee have never had any effect as a charter for the Committee except insofar as they have been specifically incorporated by reference in Rules adopted by the House in the normal course. With limited exceptions not here pertinent, Title 1 of the Act (which includes these provisions) was not to take effect until January 2, 1947, when the next Congress was scheduled to convene (§ 142, 60 Stat. 834). But when that Congress did convene, the House adopted the following resolution (93 Cong. Rec. 38):

> *Resolved,* That the rules of the House of Representatives of the Seventy-ninth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, be, and they are hereby, adopted as the rules of the House of Representatives of the Eightieth Congress * * *.

In each successive Congress the House of Representatives has adopted Rules from which the Committee's authorization is derived.[3]

[3] See *Watkins* v. *United States*, 354 U.S. 178, 203, n. 44.

The difficulties of petitioners' analysis are revealed by considering how one would treat an authorizing resolution once embodied in the Reorganization Act, but subsequently amended, as expressly contemplated in Section 101(b) of the Act, by a vote of the House alone. Petitioners do not claim that such an amendment—*i.e.*, a House Rule "pure and simple"—should be considered an "Act of Congress." Treating the original resolution, but not its subsequent amendments, as part of an "Act of Congress" would create an anomalous situation.

Denying the Reorganization Act force insofar as authorization of the Committee and other House Committees are concerned is quite possibly required by the Constitution (Art. I, Sec. 5), and in any event does not (as petitioner suggests) erase the existence of the statute entirely or attribute an absurdity to the Congress (Pet. 25–26). Titles 2, 3, 4, 5, and 6 of the Act, which comprise its great bulk, deal with legislative subjects and unquestionably have continuing force;[4] they are not subject to the unusual provisions of Section 101 that Title 1 is "an exercise of the rule-making power" of each House and subject to unilateral amendment by either. Nor was Congress' enactment of Title 1 as so limited an absurdity or useless exercise. It seemed desirable to have a hard look at the rules structure of the House and Senate as a whole; the process of examination rather than any necessary force of the end product would then be ample justification for the exercise, and the form in which the

[4] Opinion of the three-judge court, n. 3 (Pet. App. 12a).

product was promulgated may have been chosen only to emphasize the care that had been taken. Or it may have seemed important to give broader publicity and a more unified statement to the rules than they might otherwise have received.

Moreover, petitioners' attempt to base three-judge court jurisdiction upon the Reorganization Act is in any event unsupportable because the provisions of the Act relating to the Committee did not even purport to be anything more than, in the words of Section 101(a) of the Act itself, "an exercise of the rule-making power of the * * * House of Representatives * * *" (60 Stat. 814). Thus, without regard to the fact that the piece of paper in which they appeared was approved by both Houses of Congress and signed by the President, the unusual nature of the provisions in question made them by their nature not an "Act of Congress".

Thus, the courts below properly treated the question as whether the Rules of one House of Congress are or are not "Acts of Congress" within the technical meaning of 28 U.S.C. 2282. They necessarily answered that question in the negative.

2. Petitioners' catalogue of the instances in which the Committee, the courts and the Department of Justice have used language referring loosely to the "Reorganization Act" as the source of the Committee's authority lacks any persuasive force. Petitioners have pointed out no usage of such language in a situation where the distinction between an Act of Congress and a Rule of the House of Representatives was in any way determinative.

Moreover, this Court has—when related questions have been directly raised before it—indicated clearly the view that the Committee has no continuing authority and must be constituted afresh by the House Resolution adopting the Rules for each Congress. In *Gojack* v. *United States,* 384 U.S. 702, 706–707 n. 4, this Court held that "the authorization of a 'major investigation' by the full Committee must occur during the term of the Congress in which the investigation takes place. Neither the House of Representatives nor its committees are continuing bodies. Cf. *Anderson* v. *Dunn,* 6 Wheat. 204, 231; *Marshall* v. *Gordon,* 243 U.S. 521, 542. It is the practice of the House to adopt its Rules—including the Rule which establishes the Un-American Activities Committee and defines the scope of its authority—at the beginning of each Congress." The Court's opinions have consistently traced the Committee's authority to the rules adopted at the beginning of each Congress rather than the Act. *Watkins* v. *United States,* 354 U.S. 178, 203; *Barenblatt* v. *United States,* 360 U.S. 109, 115, 120 n. 15.

3. Petitioners seek to strengthen their arguments by reliance on this Court's past practice of referring to the whole of the Committee's history in determining the merits of individual cases arising out of a single Congress. We concede the validity of such historical analysis where the passage of time reveals that Congress has not, in fact, altered the scope of the Committee's authority. But the fact that the activities of a biennially reconstituted body have had

a certain continuity in the past does not eliminate the necessity for its biennial reconstitution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

NOVEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968